

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

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Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated March 31, 2005, reference 01, that concluded the claimant was discharged for work-connected misconduct. A hearing was held on April 25, 2005. The parties were properly notified about the hearing. The claimant participated in the hearing with his representative, Robert Green, attorney at law. Dawn Mastalir, attorney at law, participated in the hearing on behalf of the employer with witnesses, Louis Mozak, Lance Parsley, Joe Malsam, Susan Fenceroy, Steven Crary, Melvin McKern and Jim Cosier. Exhibits A, B, One, and Two were admitted into evidence at the hearing. Exhibit One is the video file "D:\pictures\camera11.mpg" on a compact disk.

FINDINGS OF FACT:

The claimant worked as a custodian on the night shift at West High School from January 1, 2001 to February 22, 2005. Her supervisor was Louis Mozak, the night shift supervisor. The claimant suffers from anxiety and depression, has been under a doctor's care for this condition,

Appeal Number: 05A-UI-03627-SW  
OC: 03/06/05 R: 01  
Claimant: Respondent (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

and takes medication to control her health problems. Management personnel were aware of her mental health issues since the claimant had missed work due to her problems and the employer had required a psychiatric evaluation for the claimant in November 2003. Prior to February 2005, supervisors had sent the claimant home before the end of her shift when they had determined she was too upset to work.

The claimant was scheduled to work from 3:00 p.m. to 11:30 p.m. on February 22, 2005. Before she began working, she was in the break room with Mozak and a few other night custodians. She was discussing the fact that classes were letting out early on February 24. The claimant said she wanted to start work earlier that day. One of her coworkers, Jim Lodge, told her that she could not come in early because of an e-mail issued by the building services supervisor, Jim Cosier, that custodial staff could not start early on "early-out" days. The claimant became upset because she was talking to Mozak and not to Lodge. She angrily told Lodge that she was talking to Mozak and he should stop butting in since he was not the supervisor. Everyone then went to work.

The claimant started her cleaning work for the day. Approximately one hour later, Mozak approached the claimant while she was mopping the floor in the boy's bathroom. Mozak stated that he had told vice principal, Joe Malsam, about her outburst that morning and Malsam had instructed Mozak to send her home. Mozak asked the claimant to turn in her keys and said there would be a meeting with Cosier the next day. The claimant told Mozak that she needed to finish her mopping and then would leave. After finishing the floor, she went to her locker and removed some wet boots she had worn that day and some items to be taken to the lost and found. She carried the items out through the break room and to the back dock. She returned and met Mozak, who was standing directly under the surveillance camera that points directly down the hallway to the break room. A coworker, Lance Parsley, was standing nearby when the claimant walked up to Mozak. The claimant made a comment to Mozak about the keys, handed the keys to Mozak, and turned and went back through the break room. Mozak reminded the claimant to punch out. The claimant punched out at 4:35 p.m. and left the building. The claimant did not intend to quit her employment when she left work that day and did not state that she quit to anyone. She turned in her keys because she understood that they would be needed by whoever finished her cleaning that day. She did not clean out her locker and personal items remained in her locker after she left that day. Mozak sent the claimant home that day with the intention of claiming that she had quit her job.

Mozak left a message that evening for Cosier stating the claimant had turned in her keys and quit her job. The next day, February 23, Mozak spoke with Cosier and reiterated that the claimant had turned in her keys and said she was quitting. Mozak told Cosier that the surveillance camera had captured her carrying her personal belongings from her locker and turning in her keys. On the morning of February 23, the claimant called Cosier and attempted to explain what happened at the beginning of her shift regarding her conduct toward Lodge. When Cosier informed the claimant about what Mozak told him, she denied that she had quit her employment. She told Cosier that she wanted to return to work, but Cosier explained that the employer had already posted her job position and was accepting her resignation. The employer's work rules state that employees shall give 14 days' written notice of quitting, but no one asked the claimant for a written resignation.

On February 24, the claimant reported to the office of the director of physical facilities, Melvin McKern. McKern is Cosier's supervisor. McKern informed her that Cosier had said she had resigned from her job. The claimant insisted that she had not resigned and explained what had transpired with Lodge and Mozak. She was adamant that Mozak had sent her home for the day at Malsam's direction. McKern contacted Malsam who said he had not instructed Mozak to

send the claimant home and had been out of the building from about 3:45 p.m. to 6:30 p.m. on February 22. McKern determined the claimant had quit employment and would not allow the claimant to return to work.

#### REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides for a disqualification for claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code Sections 96.5-1 and 96.5-2-a. To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989); Peck v. Employment Appeal Board, 492 N.W.2d 438, 440 (Iowa App. 1992).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. This task was made difficult because each side's evidence is internally consistent but requires the decision maker to believe that the separation from employment was a contrivance staged by the other side. The claimant asserts she was set up by Mozak to make it appear that she quit. The employer asserts that the claimant quit but manufactured a story to make it appear she had not quit. The standard of the preponderance of the evidence is not based upon a simple counting of witnesses or weighing the quantity of evidence, but involves an evaluation of the convincing quality of the evidence on each side.

One factor makes the weight of the evidence favor the claimant's version of what happened. That is the surveillance video. The question is how likely is it that a supervisor would be directly below a surveillance camera when the employee turns in their keys by accident or coincidence. In my judgment, it is highly unlikely. Parsley's appearance in the video at this exact point by accident or coincidence also is implausible. Mozak testified that he normally did not review surveillance tapes, but decided to do so at 9:30 p.m. that evening and discovered that the separation from employment had been captured on video. This raises the question as to why Mozak thought that he needed video confirmation if the claimant's quitting was so cut and dry. This is not to suggest that anyone beyond Mozak was involved in the deceit that led to the claimant's termination. It is clear, however, that management acted immediately when Mozak asserted the claimant had quit to take steps to make to sure that the claimant could not undo that determination by posting her job the next day.

The claimant's separation from employment was involuntary and initiated by the employer. As a result, the next question is whether the claimant was discharged for work-connected misconduct.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being

limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

While the employer may have been justified in discharging the claimant, no work-connected misconduct as defined by the unemployment insurance law has been established in this case.

Finally, the parties should be aware of Iowa Code § 96.6-4, which provides:

A finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States.

**DECISION:**

The unemployment insurance decision dated March 31, 2005, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

saw/s